

# Hans Kelsen and the Austrian Constitutional Court (1918-1929)\*

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**Resumen** Este artículo examina las contribuciones de Hans Kelsen al establecimiento del primer Tribunal Constitucional en Austria, analizando las diferencias centrales entre el modelo kelseniano de tribunal constitucional y el modelo de su maestro alemán, el jurista Georg Jellinek, al tiempo en el que se enfoca en el trasfondo histórico-político específico de Austria que ejerció un influjo en la configuración e incluso en el colapso del Tribunal Constitucional. De manera distinta a la mayoría de trabajos dedicados a esta cuestión, este artículo le presta particular atención a la dimensión histórico-política tras los esfuerzos de Kelsen para crear un sistema serio de defensa jurídica de la Constitución Austríaca. En este sentido, el modelo kelseniano de tribunal constitucional se analiza en referencia al problema de proteger a la joven democracia austríaca, que surgió de las cenizas del Imperio Habsburgo, en contra de sus numerosos oponentes. Este problema se ubica en el centro de los trabajos de Kelsen sobre la democracia publicados en la década de 1920.

## Palabras clave

Kelsen, Tribunal Constitucional, Austria, historia política, democracia.

## Abstract

This article intends to examine Hans Kelsen's contribution to the establishing of the first Austrian Constitutional court, analyzing the key differences between Kelsen's model of Constitutional court and that of his German mentor, the Jurist Georg Jellinek, while focusing on the concrete Austrian historical-political background which had an impact on the shaping and even on the collapse of the Constitutional Court. Unlike most of the works dedicated to such topic, this article pays a great attention to the historical-political dimension behind Kelsen's efforts to create a serious system of juridical defense of the Austrian constitution. In this sense, Kelsen's Constitutional Court is analyzed in reference to the problem of protecting the young Austrian democracy - emerged from the ashes of the Habsburg Empire - against its numerous opponents. A problem which is at the core of Kelsen's works on democracy published in the 20s.

## Key words

Kelsen, Constitutional Court, Austria, political history, democracy.

\* This article would have never been written if I hadn't had the luck and opportunity to know Professor Mario Alberto Montoya Brand. His interest and researches on Kelsen's juridical and political thought have meant to me a new stimulus to re study and re consider Hans Kelsen's early studies on the Austrian Constitutional Court. This article came from my Ph.D. investigation and exposes some of the key conclusions of it.

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“Any minority – of class, religious or national – whose interests are in any way protected by the Constitution has an eminent interest in the constitutionality of the laws.”

H. Kelsen

## 1. The Constitutional Court in Austria: the antecedents

The figure and personage of Hans Kelsen evokes even today, more than 40 years after his death, the *Reine Rechtslehre*, the separation of law from history, philosophy, and politics –initiated, in terms of methodology, with *Hauptprobleme der Staatsrechtslehre*– the critique on the sociology of law, the State as a pure normative legal order, and *Verfassungsgerichtsbarkeit*, i.e., constitutional jurisdiction.

It is precisely on this last aspect of Kelsen’s rich corpus of research that I would like to focus, in particular, on the jurist’s contribution to the creation of the Constitutional Court of Austria’s First Republic and, subsequently, to analyze the development of this institution until its considerable neutralization by conservative forces in 1929. It is not my intention to elaborate on the connections between the Court and Kelsen’s Pure Theory of Law, a subject already extensively investigated, but to illustrate the historical and political dynamics, often quite complex and conflicting, that concretely influenced the creation and, subsequently, the crisis of the first Constitutional Court of Austria which Kelsen himself had to address and mediate (Bongiovanni, 1998; Costa, Zolo, 2002; Vinx, 2007).

My present objective is to (re)read Kelsen’s contribution to the *Verfassungsgerichtsbarkeit* within the very real and pressing historical and political context the jurist and professor of law found himself operating during the period from the close of the Great War until 1929 (year in which the first Austrian democratic Constitution came to be amended in an excessively conservative mode). To fully understand this context necessitates consideration of a factor of utmost relevance: the Kelsian model of *Verfassungsgerichtsbarkeit* was to become integrated, although with elements of undeniable origi-

nality, into a legal-political tradition dating well back embodied by the Imperial Court (*Reichsgerichtshof*) of the Hapsburg era, and by prominent thinkers and political figures who had examined at great length the legitimacy and necessity of introducing effective monitoring of citizens' rights through a judicial type organ. From among these, I would note, in particular, two personalities who, for various reasons and on different occasions, can be traced to Kelsen: his ex "mentor" in Heidelberg, Georg Jellinek, and his friend, leader of the Austrian Social Democratic Party, Karl Renner.

The Imperial Court, previously mentioned, was officially introduced in 1867 on the occasion of the *Ausgleich* which had transformed the Austrian Empire into the Austro-Hungarian constitutional Dual Monarchy (Walter, 1971: 734-735).<sup>1</sup> The new governmental body exercised three main duties: *Spezialverwaltungsgerichtshof*, to protect the "political rights" of citizens, although its decisions were not "cassatory"; *Kausalgerichtshof*, to resolve potential conflicts between the Laender and the Center, which did not infringe on the competence of ordinary jurisdiction; and, finally, *Kompetenzgerichtshof*, to supervise the boundaries between administrative and judicial authorities, as well as between regional and state administrative authorities (Brauneder, 1992: 738-739).

Karl Renner was well aware of the tradition and experience embodied within the *Reichsgerichtshof* when, in his famous speech of 30 October 1918 before the Austrian Provisional National Assembly (the governmental organ that had emerged after the collapse of the Empire), he declared:

Currently we do not have the possibility of creating a State tribunal with all the guarantees of nonpartisanship and judicial objectivity. We have temporarily entrusted with this function a commission of this Assembly composed of 20 members. [...] Subsequently, in a not too distant future, we will revisit this point and instead of a State tribunal we will have a constitutional court (*Verfassungsgerichtshof*) which will occupy itself not only with the protection of citizens, but also with State provisions, the freedom to vote, and our public law (Stenographische Protokolle, 1918-1919: 33).

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<sup>1</sup> The idea of an imperial court was already clearly present in the March Constitution "granted" by Emperor Frances Joseph at the end of the revolutionary movements of '48-'49.

The social democratic Chancellor sought essentially to transform the old Imperial Court into a true constitutional court (*Verfassungsgerichtsbarkeit*). Renner had already addressed this subject in one of his most important texts, *Das Selbstbestimmungsrechts der Nationen* (1917) (*The Right of Self-determination of Nations*) in which he envisaged the democratic and federal transformation of the old empire, identifying in *Bundesverfassungsgericht* (the federal constitutional court) the necessary mechanism for protecting citizens' rights, verifying the "constitutionality" of the laws and decrees emanating from member states, or *Laender*, and safeguarding the equilibrium between these and the Center.<sup>2</sup>

Renner remained faithful to the idea of a constitutional court even in 1918, although, according to his essay of the preceding year, he favored a more unitarian solution for the new Austria, with the declared aim of opposing the rival Christian Social Party, a staunch advocate for federalism (Ermacora, 1976: 48).<sup>3</sup>

The term constitutional court was certainly not original to Renner. Rather, it derived from a work by the renowned jurist, Georg Jellinek, who in 1885 published a brief essay eloquently titled *Verfassungsgerichtshof für Österreich* (*A Constitutional Court for Austria*) in which he called for a *Verfassungsgerichtshof* (constitutional court) to enforce the division of competences between the Center and the *Laender* (regions) in the western half of the Empire (*Cisleithania*)—which he judged to be utterly insufficient and unclear—and, primarily, to defend the Constitution from potential excesses and transgressions committed by the parties or parliamentary organ (Jellinek, 1885: 8 ss).<sup>4</sup> In this sense, the constitutional court exemplified Jellinek's critical and mistrustful position towards the legislative organ, a position that accordingly characterized his work. Jellinek

<sup>2</sup> The federal constitutional court envisaged by Renner would have examined at the request of the federal government or parliament the constitutionality of a law emanating, for example, from a member state, without, however, the individual member states having the power to advance a similar request regarding a law or act of central government or parliament (Renner, 1917: pp. 292-293).

<sup>3</sup> I would like to underscore the fact that after the First World War the Christian Social Party were particularly prominent in the *Länder*, that is, where the push for a federal solution was strong, whilst the Social Democratic Party, whose "stronghold" resided in "Rote Wien", the capital of the former emperor, were in favor, in principle, of a unitary and centralized state.

<sup>4</sup> Similar consideration was expressed years before by the jurist and exponent of the Hungarian liberal movement, Count Joseph von Eötvös, who in 1854 proposed introducing a Superior Court to prevent the parliament from violating the Constitution. (Stourzh, 1989: 216-237).

proposed a complete transformation of *Reichsgerichtshof* into *Verfassungsgerichtshof* because only in this way would the Habsburg monarchy become a solid “Constitutional State” (Jellinek, 1885: 6).

It would seem that, through Jellinek, Renner had realized essentially two important tenants: first, the idea that “where there was the need for resolution, this could happen only through a court ruling”; second, the conviction that federal states, by their very configuration, needed a constitutional court that could resolve potential disputes between the center and the periphery.

From words to action was but a brief step, for between November and December of 1918 the State Chancellery set out to “ferry” the Imperial Court into the new democratic Austria, transforming it into a true and proper constitutional court. Protagonist and witness of this significant event was Hans Kelsen who in December of 1918 composed a thought-provoking memorandum on *Entwurf eines Gesetzes ueber die Errichtung eines Verfassungsgerichtshofes* (*Design for the Activation of a Constitutional Court*) in which, exactly as Renner had done, he called for the Court to provide for “electoral legitimation” and the protection of the Constitution. Jellinek himself, as we have seen, had underscored the same issue, but, in my opinion, there is an appreciable difference between the student and the teacher: in Jellinek’s case the defense of the constitutional court was, in function, clearly anti-parliamentary and from the perspective of a legal theory that recognized the ownership of sovereign power as belonging to the State alone (Fioravanti, 1976; 1999; 2001; 2002).

In Kelsen’s case there was no anti-parliamentary bias. This difference is due to several factors, from the changing historical and political context to the particular formulation of some of the major themes of public law that the young Kelsen had already expressed in his *Habilitationsschrift* of 1911 and *Hauptprobleme der Staatsrechtslehre* (*Main Problems in the Theory of Public Law*) where, in open debate with his mentor Jellinek, he defined parliament as an “organ of the people” rather than an “organ of the State”, criticizing two of the cornerstones of Jellinek’s *juristische Lehre*, that is, the idea that the State was the judicial agent and sole “producer of the law”, a function that, in his monograph of 1911, Kelsen attributed to the

parliament (Kelsen, 1911).

We shall soon see how the *memorandum* of 1918 served only as a first step towards a far more extensive and concrete contribution Kelsen dedicated to the development of constitutional justice in the Austrian First Republic.

## 2. The Creation of the Constitutional Court in Austria: history, politics, law

The mechanism of *Verfassungsgerichtsbarkeit* formulated by Kelsen is far from being *sic et simpliciter* the product of abstract scientific speculation. In many ways, this mechanism was the *response* to specific stimuli and specific historical and political issues among which one of the most compelling regarded the institutional form the new Austria would assume: *Would it be better to transform the country into a unitary and centralized State or a federal republic? Would it be better to opt for a federation or a confederation?* A question anything but rhetorical or “academic” in an Austria fresh out of the first world conflict: the fall of the Empire had immediately led to an open “confrontation/clash” between the new central institutions, namely, the National Assembly, and the Laender. Subject of the “dispute” was the future institutional design of the country. The first law (here, I would translate as “act”) issued by the Constitutional Provisional National Assembly (established in 1918), sanctioned the transition from a monarchy to a democratic republic founded on the primacy of legislative power, a principle ardently supported by the Social Democrats who, within the two-year period of 1918-1919 represented one of the major political forces in Austria (Stenographische Protokolle, 1918-1919: 32-33).<sup>5</sup>

If the Socialists were favorable to a unitary design, the Christian Socialists, the main conservative party, pressed for a federation, interpreting, thus, the reasoning of the Laender. It was immediately clear to all that the unitary and centralized option was not feasible,

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<sup>5</sup> From the social democratic perspective, the primacy of the legislative organ, not only represented a way to underscore the radical political changes occurring in Austria after the end of the Monarchy but also the true and proper guarantee of popular sovereignty, for which the Socialists had relentlessly fought.

for which the *political* problem that arose for the Provisional National Assembly and the political parties that took part in it was to determine *how much liberty* to grant to the Laender and *which competences* (Stenographische Protokolle, 1918-1919).

The SPÖ (Austrian Social Democracy) understood the first constitutional law as an integral part of a broader political design that envisaged a clear and precise subordination of regions to the Center. From this perspective, one could interpret the law of 14 November 1918 as the “assumption of State authority in the Laender” which recognized the autonomous administration of the regions and municipalities but reaffirmed the existence of a State in which the regions, in fact, held a subordinate position in respect to the Center. This latter aspect was explained in the principle of “*Bundesrecht bricht Landesrecht*” (the law created by the Center prevails over that of the regions), according to which the laws approved by regional assemblies could only be enacted if ratified by the State Council (Stenographische Protokolle, 1918-1919: 65 ss.).

The Constitutional Court was officially introduced on 25 January 1919: it would arbitrate conflicts of competence, potential disputes between central institutions and the Laender—as Kelsen himself advocated in his *memorandum*—and the violation of political rights (Schmitz, 2003: 245-246). Within a few months decisive steps had been taken for the future of the country, but relations between the Center and Laender had to be better defined. This consisted, essentially, of determining *what type of federal State to create*, in other words, of *writing* a constitution.

It was Karl Renner, in his position as Chancellor, who entrusted Kelsen in the spring of 1919 with the task of drafting several constitutional blueprints.<sup>6</sup> The first, the so-called K-I, was certainly the most *laenderfreundlich* (favorable to the Laender). It was inspired by the Swiss Constitution of 1874, providing for a *federal* solution as well as the equalization of the Federal and Laender Chambers and the considerable independence of the regional legislation from that

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<sup>6</sup> More precisely, it was at the end of October 1918 that Kelsen was invited by Renner to participate, as a jurist and legal technician, in the drafting of the Constitution. (Losano, 2008: 108).

of the Bund (Schmitz, 1981: 114; Schmitz, 1991: 49-59).

Renner clearly disapproved of the *laenderfreundlich* aspect of the K-I, so Kelsen elaborated two additional plans that reflected a major influence on the part of the Social Democratic Party leader. In the K-II the Austro-German State was defined as “a democratic republic, founded on popular sovereignty” and the relationship between the Center and the Laender came to be modified in favor of the former (Schmitz, 1981: 114). Kelsen realized that the endgame would have obtained a federal solution but considered equally important specifying what he intended by federal State and, particularly, the connection between constitutional jurisdiction and a federal system. A contribution of chief importance in this vein was *Die Stellung der Laender in der kuenftigen Deutschoesterreich* (*The Position of the Laender in Contemporary German Austria*), a brief essay published the day after the law of 14 March 1919 on the “assumption of sovereignty in the Laender” (Kelsen, 1919: 8).

Kelsen clearly envisaged that the new Austria would be transformed into a federal State, but this did not necessarily entail the idea of Austria being a “(con)federation of the Laender” –as was, on the contrary, sustained by the Laender– because, according to Kelsen and, likewise, to the Social Democrats and Renner himself, *sovereignty was not granted by the Laender to the National Assembly, but by the National Assembly to the Laender*:

The concept of a free and contractualistic union of the Laender with German Austria as a federation of states (confederation) and the concept of an Austro-German State existing in a unitary constitution are irreconcilable. (Kelsen, 1919: 9).

The Austrian State had been achieved following the assumption of full sovereignty on the part of the National Assembly and not on the basis of a contract with the Laender. Shifting from theoretical sphere to practical application, Kelsen observed that the new Constituent Assembly would opt for the federalist solution, but precisely in this eventuality it would become vital to neutralize the centrifugal tendencies of the Laender and to maintain equilibrium between them and the Center, setting in motion a “*Bundesverfassungsgerichtshof*”. The latter could appeal to the Bund, the federal govern-



ment, against unconstitutional laws of the Laender, in defense of the Constitution (Kelsen, 1919: 11). Kelsen's position reflected in part the law of 14 March 1919, which introduced preventative control by the federal government over laws produced by the Laender when there was suspicion of unconstitutionality (Ermacora, 1989: 32-33).

Months later, Kelsen challenged the contractualistic claims of the Laender in his article published in 1920 for "Neue Freie Presse", *Der Vorentwurf der oesterreichischen Verfassung (Preliminary Design of the Austrian Constitution)*. The Austrian Federal State *was not born after* the Laender had ceded their native sovereignty to the new central institutions, rather, on the basis of the concrete necessity to preserve the unity of the State from the destructive potential of the Laender:

If the Swiss ascribe so great an importance to their individuality, they did so for good reason, because before the cantons there was no State and since that very State was born following a progressive sharing of common existence. For us the State is everything, it is a unity (Kelsen, 1920: 317).

After the collapse of the old empire, a State was created, based, for a series of reasons, on a specific federal organization. In Austria the whole preceded the parts and, on this very basis, the jurist rebuffed the equitative partition of the Federal and Laender chambers, for which, in the case of conflicts between regions and central institutions, he proposed a constitutional court to which the federal government could appeal exclusively (Kelsen, 1920: 321).

In his 1920 article Kelsen expressed a position that, on a political level, was closely analogous to the social democratic position and, at the same time, reasserted his faith in constitutional jurisdiction as a necessary tool for balancing the relations between the Center and the regions within the Federal State, averring an idea long ago expressed by his former mentor of Heidelberg, Jellinek (Pergola, 1981: VII). In the aforementioned articles, Kelsen thus entered into a rather broad political debate directly regarding the relationship between the Center and the Laender in the future Federal State around which a series of important political and public

initiatives was conducted, for example, the interdepartmental talks held in the Chancellery (of which Kelsen himself took part). The issue reemerged, central to both Renner and Kelsen, of absorbing and neutralizing the centrifugal forces of the *Laender* in the future Federal State. With this perspective, during the interdepartmental session of 11 October 1919, Renner reiterated several times the importance of preventing the laws created by the *Laender* from having predominance over those of the *Bund* (Ermacora, 1981: 73).

This position was in open contrast to that expressed by numerous *Laender*, particularly the *Land Tyrol*, a position which, in a constitutional draft written by the jurist Stephan Falser and sent to Renner in September of 1919, called for, analogous to the Swiss Constitution of 1874, the equal relegation of federal legislation to a federal assembly and a regional chamber and the creation of a constitutional court to which the *Landtag* (State Diet), i.e., regional parliaments, could appeal against a federal law deemed unconstitutional (Schmitz, 1981: 62).

From this perspective, in the summer of 1920, the writing of the Constitution passed definitively into the hands of three great parties (Social Democratic, Christian Socialist, and Nationalist), whose constitutional drafts were sent to the Subcommittee on Constitutional Affairs (Schmitz, 1991: 96-97).

All three spoke of a federal republic, two chambers, one federal and the other regional, and a constitutional court to which, on the specific request of the *Tyrol*, the *Laender* could appeal. In the draft of the Social Democrats, a preference accorded to the *Bund*, however, was evident (Ermacora, 1967: 158-159).<sup>7</sup>

It was the Subcommittee on Constitutional Affairs that was commissioned with writing the text of the Constitution which, generally speaking, resulted in a sort of compromise among the three great Austrian parties. During the subcommittee session, Kelsen himself played a key role: maintaining a position similar to that

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<sup>7</sup> As testimony to this, in the social democratic draft, presented by Robert Dannenberg, distinguished member of the party, the Federal Chamber (*Bundestag*) was defined as "the highest legislative organ", while in the *Länder* Chamber (*Bunderat*) was entitled to a "right of veto" that the Federal Chamber could easily override by voting a second time for a law proposed and potentially thwarted by the other Chamber. *Ibid.*

of the Social Democrats, Kelsen defended the primacy of legislative power and the legality of the administration; moreover, the division of the Constitution into chapters was duly influenced by him. In regard to the Constitutional Court, with the contribution of his student, Adolf Merkl, Kelsen introduced the so-called *ex officio* procedure which envisaged the possibility of the self-activation of the Constitutional Tribunal regarding laws or regulations that constituted the premises of its rulings. In other words, the principle of the Constitutional Court was to be realized as “objective defender of the Constitution”, a principle to which Kelsen would remain ardently faithful in the years to come (Bongiovanni, 1998: 190).

### 3. Kelsen and constitutional justice (1920-1929)

The promulgation of the Austrian Constitution in October of 1920 did not exhaust Kelsen’s dedication to, and interest in, the Court and its functions. Moreover, in 1920, he was appointed judge of the Constitutional Court, in place of his mentor, Edmund Bernztzik, who had died shortly before.<sup>8</sup>

It was specifically in 1920 that the Austrian jurist published one of his fundamental works, *Das Problem der Souveranität* (*The Problem of Sovereignty*), in which he defined the State as a legal order and sovereignty, a “quality” of this order. Three years later he returned to occupy himself with the Constitutional Court in *Verfassungs und Verwaltungsgerichtsbarkeit im Dienste des Bundesstaates, nach der neuen österreichischen Bundesverfassung vom 1 Oktober 1920* (*Constitutional and Administrative Justice in the Service of the Federal State*).

For Kelsen, constitutional and administrative jurisdiction represented two of the more important institutions introduced into the new Austria, their being essential to preserving the equilibrium between the federation and the regions, between the Center and the *Laender*, and, therefore, to maintaining the intrinsic unity of the State. Kelsen departed from historical data to develop a broader and more substantial reflection on the meaning and value of constitutional and administrative jurisdiction.

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<sup>8</sup> Kelsen remained judge of the Constitutional Court until 1929. (Losano, 2008: 110-111).

Kelsen noted that the Federal Constitution was rapidly enacted by the Constituent National Assembly<sup>9</sup> in order to prevent the Laender from taking advantage of a drawn-out decision-making process to “realize the Constitution by agreement” and thus transform Austria into a confederation. Analogous to what has previously been stated, in *Der Vorentwurf der oesterreichischen Verfassung* (1920), Kelsen interpreted the Federal Constitution as “the law of a unitary State transformed into a federal State” (Kelsen, 1920: 11).

To Kelsen, characteristic of both jurisdictions was a substantial “reciprocity”:

By this route the control the constitutional court and the administrative court exercise in regard to the Laender loses its semblance of unilaterality; so much so that the Constitution observes in this regard a certain reciprocity recognizing for the control over the Laender, the initiative of the Federation, and for the control over the Federation, the initiative of the Laender. (Kelsen, 1920: 11).

The reciprocity of which Kelsen was speaking and which –as we have previously sought to demonstrate– was painstaking established after a long and acrimonious confrontation between the representatives of the central institutions and the Laender, was the essential indicator of a balance having been achieved between “federal law” and “regional law”:

The solution that the Austrian Constitution offered to the conflict between federal and Laender law appears thus to also be in accordance with the principles of the Federal State. Not federation law such that prevails over the law of the Land but constitutional law prevails over that which is unconstitutional, that it would consist of the law of the Federation and of the Land. (Kelsen, 1920: 22).

For Kelsen, such a “balance” was, so to speak, the natural corollary of what could be termed the primacy of the Constitution, or, better, constitutional law:

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<sup>9</sup> The Constituent National Assembly was succeeded by the Provisional National Assembly.

In calling for the examination and nullification for the unconstitutionality of a law, the federal government and the governments of the Laender are not required to demonstrate that the contested law had transgressed against a particular interest of theirs. That which the Federation and the Laender—by means of a reciprocal control—assert is the interest in the constitutionality of the law. (Kelsen, 1920: 23).

If constitutional and administrative jurisdiction was to ensure the “constitutionality of the law”, *what was the significance of the Constitution?* Kelsen responded to this question in one of his most elegant and famous essays, *Constitutional Justice*. (Kelsen, 1928: 150). I would like to reflect particularly on the *political* significance of his response which, in my opinion, aids in a better understanding of the stance the jurist maintained, specifically at the close of the 1920s, towards the slow and unrelenting decline of democratic institutions in Austria:

Notwithstanding the multiple transformations undertaken, the notion of constitution has retained a permanent core: the idea of a supreme principle that determines the whole State order. Whatever the means by which it comes to be defined, the constitution is ever the foundation of the State, [...] the essence of the established community by this order. [...] What is intended in the first place and in each case by constitution [...] is a principle in which the balance of political forces is legally exerted in a given moment. (Kelsen, 1928: 152).

The constitution was thus the supreme foundation of the State, product, in a tangible historic process, of a *compromise* between diverse forces and political groups with their diverse ideas, interests and perspectives.<sup>10</sup> Precisely:

It is the indispensable basis of the legal norms that regulate the reciprocal conduct of the members of the State collectivity and, therefore, as well, those legal norms that determine the organs necessary for applying and imposing them, and the mode in which such organs must proceed, definitively, the fundamental structure of the State order. (Kelsen, 1928: 153).

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<sup>10</sup> It should be highlighted that the idea of equilibrium between the various political forces represents one of the principle themes of Kelsen's first works dedicated to democratic theory; specifically, I am referring to the first and second editions of *Vom Wesen und Wert der Demokratie* (1920; 1929).

Nevertheless, Kelsen recognized that the constitution not only envisioned norms that “regulate the formation of the laws” but also “their content”; parliament, in fact, was obligated to respect and give due and careful consideration to these very principles in its legislative work.

The Constitution is, then, not only a procedural rule but also a substantive rule; therefore, a law may be unconstitutional either because of a procedural irregularity related to its creation or because of content contrary to the principles or directives formulated by the constituent, when it exceeds the preset limits (Kelsen, 1928: 154).

Whether in the “formal” or “material” sense of the term, the Constitution was the supreme “foundation of the State”, and, specifically because of this, it was absolutely necessary to “ensure” to it “the greatest stability”, (Kelsen, 1928: 153) which, in the opinion of the jurist, could not be guaranteed by a parliament that believed itself “the liberal creator of law and not the organ which applies it” (Kelsen, 1928: 171):

It is therefore not possible to rely on the parliament itself to realize subordination to the constitution. The task of nullifying its unconstitutional acts must be entrusted to a separate organ, independent of it and of any State authority, i.e., a constitutional jurisdiction or tribunal (Kelsen, 1928: 171-172).

To those who saw in the constitutional court a serious and dangerous restriction on the sovereignty of the legislative organ, Kelsen responded that legislation itself was “subordinate to the constitution” (Kelsen, 1928: 172). During the process of creating the Constitution (1918-1920), Kelsen supported Austria’s legal-centric paradigm, so ardently advocated by the SPÖ and by Renner, but, in regard to the protection of the Constitution, he saw in the excessive power of Parliament, as well as of the Executive, a potential threat to the protection of the Constitution (Pergola, 1981: X).<sup>11</sup>

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<sup>11</sup> One recalls in this regard the *quarrel* between Kelsen and Carl Schmitt on *The Guardian of the Constitution*, in which Kelsen, in debate with Schmitt, argued against the idea of entrusting the protection of the Constitution to the president of the Republic, or to a person who was not a judge.

On the other hand, Kelsen attributed to constitutional jurisdiction the rather *political* merit of preserving the principle of “division of power”, since, by such means, it was possible to avoid the “concentration of excessive power in the hands of a single organ”, for example, the parliament or the president of the Republic which, as the jurist was quick to explain, would be “detrimental to democracy” (Kelsen, 1928: 174).

The rest of the essay was dedicated to the juridical-technical aspects of constitutional justice and constitutionality control. Kelsen examined the subject, its criteria, the procedure for the control of constitutionality, to conclude with a dense final chapter on the “legal and political meaning of constitutional justice” which, to me, renders a particularly interesting historical-political perspective, when related –as I will do shortly– to the particular Austrian political reality of that period (Kelsen, 1928: 160-198).

On a *juridical* level, Kelsen observed that “a constitution that is missing the guarantee of nullification of unconstitutional acts is not, in a theoretical sense, completely binding” (Kelsen, 1928: 199). In my opinion, however, the matter becomes still more interesting when Kelsen turned his attention to the *political* implication of constitutional justice. In short, constitutional justice should ensure that the laws enacted by the parliament were “constitutional” and that, specifically in performing this important function, it allowed for a concrete protection of the minority against movements of liberticide on the part of the majority present (Kelsen, 1928: 201-202):

The domain of the latter is tolerable only if it is regulated. The specific constitutional form, which ordinarily consists in the fact that the revision of the constitution requires a reinforced majority, signifies that some fundamental issues can be resolved only with the agreement of the minority; the simple majority, at least on some matters, does not have the right to impose its will on the minority, in the sphere of guaranteed constitutional rights. Any minority – of class, religious or national – whose interests are in any way protected by the constitution has an eminent interest in the constitutionality of the laws. (Kelsen, 1928: 202).

Constitutional justice, in its most *political* sense, seemed to Kelsen a tool of effective guardianship of the minorities and, in final

analysis, of the very democracy which had to be founded on a dialectical and peaceful relationship between majority and minority (Kelsen, 1928: 203). In this way, Kelsen did nothing but confirm what had already been asserted, eight years prior in *On the Essence and Value of Democracy*, namely, that a political order was genuinely democratic on the condition of true protection of the minority: constitutional justice had to be considered from this perspective. In political terms, the Constitutional Court acquired its full and complete meaning specifically within the federal states, since it was established to guarantee the lasting equilibrium between the Center and the regions:

It is no exaggeration to affirm that the political idea of the Federal State is fully realized only with the institution of a constitutional tribunal. [...] The essence of the Federal State [...] resides in the allocation of functions whether legislative or executive between the central competent organs for the State—or its territory—in its entirety and a plurality of local organs, whose competence is limited by the State, to a part of its territory (Kelsen, 1928: 204-205).

In this passage Kelsen was clearly referring to what he had stated in his 1918-1919 papers with the scope of, once again, highlighting the inescapable bond between federation and constitutional court, whose role, therefore, was that of “an objective and, so to speak, arbitral organ” capable of mediating and resolving the “conflicts of interest characteristic of the Federal State” (Metall, 1969: 45-48).

The efficient solution to such a potentially disruptive “conflict” came to be secured, among other things, by the authority accorded not only to the Central State but also to the member states to appeal to the Constitutional Court. Kelsen thus reaffirmed the *reciprocity* of constitutional justice, which he had already addressed in *Verfassungs und Verwaltungsgerichtsbarkeit* (1920), and that had been *historically and politically* affirmed in the new Austrian Republic at the close of the constitution-writing process, after extensive and drawn-out negotiations between the central institutions, in particular, the Social Democrats, and the Laender, often supported by the Christian Socialists.



In the two essays previously cited, the Constitutional Court came thus to represent the guarantor of State unity and indispensable mechanism for better safeguarding the Austrian democratic system.

The essay on *Constitutional Justice* was published, poignantly, in 1928, when, by this point in time, the political equilibrium of the country was veering ever more in favor of conservative forces, the Christian Socialists and the Nationalists (Metall, 1969: 45-48).

Already in 1927, the Christian Socialists, bolstered by ecclesiastical support, launched a vast anti-socialist offensive, with the scope of modifying the 1920 Constitution towards an ever more conservative model, shifting the “barycenter” of power from Parliament to Government. One of the principle obstacles to overcome in order to realize such an ambitious design was certainly the Constitutional Court which had to be reorganized and subdued to the interests of the Christian Socialists (Metall, 1969: 47-50).

Specifically, the close of the 1920s witnessed the creation of an open clash between the Court and the Christian Socialists regarding marriage law. The latter—in line with the religious principles of a profoundly Catholic country like Austria—resolved that marriage (Catholic) was an indissoluble bond, but, at the same time, the administration could grant so-called “dispensations” with which the spouses of Catholic faith, who were effectively living separately, could marry again (Losano, 2008: 113-115). The (political) problem emerged from the fact that the dispensations granted by the administrative organs often came to be declared “invalid” by the Austrian courts, for which, as Kelsen noted in an autobiographical work, “it was difficult to rouse the State authority in a more disruptive manner” (Losano, 2008: 116).

With the passage of time, the issue, by turns and contours having become ever more paradoxical and farcical, arrived at the Constitutional Court which from the mid-1920s had begun to set itself in opposition to the ordinary courts “for their incompetence in declaring the administrative acts illegitimate” (Losano, 2008: 119). The action of the Court, according to Kelsen, was substantially aimed at maintaining a clear “delimitation of competences” between courts and administrative organs.

Attentive observer of his time and of the speed with which the Austrian political scenario was changing, Kelsen published, in 1929, two short papers on designs for constitutional reform. As a jurist, he enumerated, point by point, *The Fundamental Lines of Constitutional Reform* that, in a word, consisted of three fundamental requirements: 1) *the creation of a third chamber, for professional, i.e., corporate representation*; 2) *the convocation of the National Council, i.e., the central Parliament, for “two ordinary sessions”, for which the Parliament would no longer be understood as “permanent organ”*; 3) *the Federal President, to whom was consigned the power to “dissolve the National Council”, would have the power to enact “regulations (ordinances) and regulations of necessity”* (Kelsen, 1929: 60-61).

According to Kelsen, at the heart of these *lines of reform*, here briefly summarized, was an underlying rather precise political design, i.e., the “struggle against parliamentarianism”. To better explain the meaning of “struggle” and therefore to better understand the “occasion and feasibility of such designs”, in his article on *The Push for Reform*, Kelsen posed a comparison between Austria’s first democratic Constitution and the plans presented by the conservatives, shifting his reflections from a legal-theoretical plane to a more strictly political one—although, all transpired under the “guise” of a discourse which he wanted be (or, rather, which he claimed to be) non-evaluative, equable, and strictly scientific.

Kelsen referred to the definition of the constitution as “expression of the political forces of a particular people”, calling to mind that the Austrian Constitution was the product of a great political compromise between the two majority parties, the Christian Social Party and the Social Democratic Party: the former had prevented the new Constitution, in a manner analogous to that of the far more advanced and progressive Weimar, from affirming a clear separation between the religious and political spheres; the latter had prevented the new State from reorganizing itself into a large confederation of *Laender* (Kelsen, 1929: 49-51). Another key feature of the first democratic Constitution was parliamentarianism, that is, the creation of a republic based on “parliamentary government”. In this, Kelsen observed a dangerous internal contradiction emerge which he considered one of the principle reasons for the profound crisis that be-

fell Austria: the most powerful party in the central Parliament (*Nationalrat*), the SPÖ, remained in continuous opposition from 1920, while the CSÖ had progressively consolidated its control over the Executive (Kelsen, 1929: 51-53).<sup>12</sup>

A situation thus emerged, somewhat paradoxical and potentially dangerous, in which the Socialists “exercised a decisive influence on the formation of the will of the State in the legislative office”, while the conservatives controlled the reigns of the judiciary and administrative systems (Kelsen, 1929: 53).

The result of the political development of the Federal Constitution of 1920 is a strong imbalance of power between the power of the opposition [the Social Democrats] within the Legislative branch and its lack of power within the Executive branch. From a sociological point of view, the sense of present constitutional crisis resides in the attempt of bourgeois groups to convey their position of power within the Legislative branch at the level achieved within the Executive, and to restrict or even eliminate the parliamentary system (Kelsen, 1929: 54).

Kelsen was cognizant of a “shift of power” which was, in fact, changing the face of Austria:

If the call to amend the Constitution grows to such a point that it cannot further be deferred, it is certainly a sign that there was a shift of power which endeavors to express itself at the constitutional level. Such a shift of power is clearly the more deep-rooted reason for the Austrian political crisis (Kelsen, 1929: 49).

In the two brief papers of 1929, legal-technical considerations intertwined with those more strictly political. Kelsen endeavored to present the characteristics which he retained were the more significant reasons for the Austrian crisis, and to present them in the most detached manner possible, in essence constructing a discourse that, in its intentions, was to be *descriptive*. With the approval of the

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<sup>12</sup> It is interesting to observe how in the short paper of '29, thinking back to the constituent period, Kelsen sustained that in reality the Christian Socialists had willingly accepted the parliamentary government. From an analysis of the *Stenographische protokolle der provisorischen Nationalversammlung* and of the *Konstituierenden Nationalversammlung* (1918-1920) one derives a very different impression. In this regard I would refer to chapter III *La nascita della Repubblica democratica austro-tedesca: ottobre 1918-marzo 1919* In: (Lagi, 2008)


constitutional reform of 1929 the democratic and legal-centered Republic, born from the ashes of the Austro-Hungarian Empire, became a semi-fascist regime of which Dolfuss and Schischnigg were its most famous exponents (Pergola, 1981: XI).

One of the most disruptive effects of the constitutional reform was the dissolution of the old Constitutional Court and the creation of a new one, acquiescent to the interests of the Christian Socialists, whose members were no longer elected for life by Parliament, but nominated by the government. It was a change made possible only by the support of the Socialists themselves who had given their consent in exchange for the presence of two Social Democratic judges out of fourteen, a choice that Kelsen himself would not hesitate to describe in one of his autobiographical papers of 1947 as stupid and dangerous:

I said openly to Seitz [referring to Karl Seitz, socialist mayor of Vienna] that I thought that the abolition of an independent Constitutional Court by the government was a particularly unfortunate step, because at that time the fascist inclinations of the Christian Socialists were already particularly evident[...] however the Social Democratic Party retained that it had to accept the constitutional reform proposed by the government in order to save the autonomy of Vienna, which the government was threatening to restrict if the party did not accept the reform (Losano, 2008: 121).

It was in that same fateful year of 1929 that Kelsen published the extended second edition of *Vom Wesen und Wert der Demokratie* (*On the Essence and Value of Democracy*) in which he analyzed what he retained to be the specific characteristics of modern democracy, of a system that seemed to be inexorably falling apart in Austria and, in great part, Europe, and in which he endeavored, ultimately, to identify that *highest value*, or better, *those highest values*, that, by his judgment, rendered modern democracy the best possible political form. With his characteristic equable and clear language, Kelsen passed from a *descriptive* plane to a *prescriptive* one, so to speak, siding openly with *liberal*, *pluralistic*, and *parliamentary democracy*, defending it within that “core” of *tolerance*, *dialogue*, *selection from below of the popular ruling class*, and *liberty*, which, in his judgment,

was, at its very root, what distinguished it from its antithesis, autocracy (Kelsen, 1929).

In this regard, *The Essence and Value of Democracy* clearly expressed the political *ideality* behind Kelsen's defense of the Constitutional Court, which the jurist would revisit several years later in a debate with Carl Schmitt, a *democratic and liberal* ideality that constitutional justice, in Kelsen's judgment, could effectively guarantee and safeguard. 

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